LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
NOV 7 - 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Petitioner,

vs.

KING PACKING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for King Packing Company

WILLARD S. JOHNSTON
GEORGE H. JOHNSTON
256 Montgomery Street
San Francisco, California

Attorneys for Respondent King Packing Company

PARKER PRINTING COMPANY, 190 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Question Presented	1
Supplemental Statement of the Case	2
Summary of Argument	5
Argument	7
I. The knife sharpening here is included within the meaning of "any" activity preliminary to the employee's principal activities and so is non-compensable	7
A. The statute excludes all preliminary activities	7
B. The Trial Court's findings, supported by evidence and affirmed by a unanimous Court of Appeals, are conclusive	10
II. The petitioner's argument that "principal activities" includes "indispensable activities" is without foundation. Petitioner's construction would bring back the conditions sought to be remedied by the Portal Act	13
A. Petitioner's contention that past and future claims are treated differently in the statute, with which we agree, does not support his conclusion that only unnecessary activities are excluded	14
B. The history of the Portal Act in Congress shows that Congress intended Section 4 to preclude claims like those involved in the Mt. Clemens Pottery Co. case, and here	18
C. The 1949 Amendments to the Labor Standards Act are irrelevant to petitioner's interpretation of the Portal Act	21
Conclusion	24

CITATIONS

Cases	Pages
Addison v. Holly Hill Fruit Products, 322 U.S. 607, 64 S. Ct. 1215 (1944)	8
Alstate Construction Co. v. Durkin, 345 U.S. 13, 73 S. Ct. 565 (1953)	23
Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S. Ct. 1187 (1946)	4, 5, 8, 18, 19, 20
Central Missouri Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir., 1948)	15
Ciemnoczolowski v. Q. O. Ordnance Corp., 12 WH Cases 469, 55 A.L.C. 612 (April, 1955)	10
De Ganay v. Lederer, 250 U.S. 376, 39 S. Ct. 524, (1919)	8
Galvin v. National Biscuit Co., 82 F. Supp. 535 (1949)	21
Maneja v. Waialua Agricultural Co., 349 U.S. 254, 75 S. Ct. 719 (1955)	23
Markert v. Swift & Co., 173 F.2d 517 (2d Cir., 1949)	8
Martin, Glenn L., Nebraska Co. v. Culkin, 197 F.2d 981 (8th Cir., 1952)	15
McComb v. C. A. Swanson & Sons, 77 F. Supp. 716 (D. Neb. 1948)	9
Mitchell v. Southeastern Carbon Paper Co., 12 WH Cases 559, 55 A.L.C. 891 (June, 1955)	10
Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 67 S. Ct. 789 (1947)	17
Smith v. Cleveland Pneumatic Tool Co., 173 F.2d 775 (6th Cir., 1949)	15
Smith v. Cudahy Packing Co., 76 F. Supp. 575 (D. Minn. 1947)	8
Steiner v. Mitchell, 215 F.2d 171	10, 22
Stock, F. W. & Sons v. Thompson, 194 F.2d 493 (6th Cir., 1952)	15
United States v. Missouri Pac. R. Co., 278 U.S. 269, 49 S. Ct. 133 (1929)	17
United States Steel Co. v. Burkett, 192 F.2d 489 (4th Cir., 1951)	15

STATUTES

Pages

Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, (29 U.S.C. 201, *et seq.*):
Sec. 3(o) 6, 21, 22
Sec. 16(c) 7, 22

Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 52 13

Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U.S.C. 251, *et seq.*):
Sec. 1 ..... 6, 17, 24
Sec. 1(a) 17
Sec. 2 ..... 6, 14, 15, 16
Sec. 3 15
Sec. 4 ..... 5, 6, 7, 10, 14, 15, 16, 17, 18, 21
Sec. 9 16
Sec. 10 16

MISCELLANEOUS

93 Cong. Rec.:
2084 14
2111 24
2119 24
2122 24
2124 14
2131 ..... 14, 16
2181 15
2182 ..... 15, 24
2194 24
2237 20
2245 20
2249 21
2259 20
2268 20
2293 14
2297 20
2299 20
2350 20
2363 24
4269 20
4388-9 20
4389 24

Pages

General Statement as to The Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938.

29 C.F.R. 790, 790.7(b), 12 F.R. 7655, 7658 11
29 C.F.R. 790.7(h), 12 F.R. 7659 12
29 C.F.R. 790.8(a), 12 F.R. 7659-60 22

S. Rep. No. 48, 80th Cong. 1st Sess. 18, 19

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Petitioner,

vs.

KING PACKING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for King Packing Company

QUESTION PRESENTED

Section 4(a)(2) of the Portal Act exempts from the minimum wage and overtime compensation requirements of the Labor Standards Act "*any*" activities "preliminary to or postliminary to" the employee's principal activity. Does this exclusion apply merely to those preliminary or postliminary activities which are incidental and unnecessary to the principal activity?

SUPPLEMENTAL STATEMENT OF THE CASE

The record establishes without contradiction that the custom for at least the last 20 years at respondent's plant has been that the knifemen appear at work with sharp knives, and that knifemen are only compensated for that work which is directly supervised and required by the employer (R. 60, 153-54).[1] Their rate of compensation—necessarily reflecting this custom—is arrived at by collective bargaining (Pl. Ex. 11, R. 32). The Secretary of Labor charges that this long-settled custom is a violation of the Labor Standards Act (Complaint, par. VI, R. 5).

This arrangement, which has proved satisfactory for 20 years, balances the needs and preferences of the knifemen against those of the employer. The knifemen have different methods of sharpening their knives and prefer to sharpen and use their own knives exclusively (Fdg. VIII, R. 17; 63, 72, 80, 102, 122, 139). As respondent's production manager stated: "[Y]ou won't find two men that sharpen knives alike." (R. 71). "[T]hey don't want anybody sharpening their knives, each seems to have a little different taste, each man takes a good deal of pride in his knife and he doesn't care for anyone to monkey with it. . . . [S]ome might like [the edge on their knives] feathered, and some like it smooth." (R. 63). If they trade a knife "they shape it up the way they like it" (R. 63). The testimony of the knifemen clearly shows that they consider the knives their individual tools to care for and use in their own way (R. 122, 139).

The respondent itself owns more costly knives and so has an emery stone and grinding wheel in the plant (Fdg. VII,

---

1. References to the printed transcript of record filed with this Court are designated "R." Whenever in a series of references a semicolon appears, references preceding the semicolon are to the findings or opinion of the trial judge; succeeding references are to the supporting evidence.

R. 17; 48-49, 62-63, 105, 157, 162). As a convenience the knifemen commonly use this equipment to sharpen their own knives (Fdg. VII, R. 17; 48-49, 62-63, 105, 157, 162).

Knife sharpening by the employees consumes an average of 10.4 minutes per day (Fdg. XI, R. 18; 70). This time varies from day to day and from man to man. The men use different numbers of knives from day to day (R. 88, R. 110, R. 124, R. 131, R. 140, R. 148). Different men performing different operations will use from 3 to 6 knives a day (R. 88, R. 110, R. 124, R. 131, R. 140, R. 148). Knife sharpening time for different men varies greatly depending upon their skill—"the better butchers sharpen their knives in as little as 3 minutes and on down to the poor knife man and he takes as long as 20 minutes or a half hour" (R. 70. See also R. 74-75, R. 88, R. 109-110, R. 117, R. 118, R. 120, R. 125, R. 133, R. 141, R. 142, R. 148). And the fact that different men prefer different edges will affect the amount of knife sharpening time—"What one employee might consider a sharp edge another might consider dull? Yes sir, that is right" (R. 80).

The knifemen are free to sharpen their knives at any place, at any time outside regular working hours, and in any manner or by any method they choose (Fdgs. VII, VIII, R. 17; 62-63, 105, 157, 162). Respondent does not specify the degree of sharpness of the knives, or the type of edge the knife should have (Fdg. VIII, R. 17; R. 71, 156, 169). Respondent exercises no discipline or control whatsoever over the sharpening room or the activities of the knifemen while they are sharpening their knives (Fdg. VIII, R. 17; 63, 67, 108, 120, 156).

On the basis of these facts the Trial Court found (1) that the principal activity or activities which the respondent's knifemen are employed to perform are the killing, cleaning

and cutting up of carcasses of cattle and hogs, and (2) that the sharpening of knives by the knifemen outside their regularly scheduled shift time is preliminary and postliminary to such principal activity or activities which they are employed to perform (Fdgs. XIII, XIV, R. 18, 19). Commenting in his opinion on the evidence supporting these findings of fact, Judge Healy stated:

> "The evidence is that [the knifemen] are employed to perform work in the killing and cutting rooms of the plant in the slaughter of cattle and hogs, and in the cleaning and cutting up of the carcasses. These are their principal activities. They are obviously not employed to sharpen knives. The knives are their own tools with which they are required by the terms of their employment to equip themselves for the proper performance of the work they are employed to do." (R. 12)

He accordingly concluded, after finding further that off-shift knife sharpening is not compensated by contract or custom in respondent's plant and is materially different from other operations performed during regular working hours and customarily compensated, that the time spent by employees in sharpening their knives outside regularly scheduled shift time is not compensable under the Labor Standards Act as modified by the Portal Act (Fdgs. IX, XII, Concl. VI, R. 17-18; 20).

The decision of the Trial Court was unanimously affirmed by the Court of Appeals for the Ninth Circuit (R. 179-182). Judge Orr, speaking for the Court, noted that the Portal Act was passed by Congress subsequent to the decision in *Anderson v. Mt. Clemens Pottery Co.*[2] "with the purpose in mind, among other things, of making non-compensable certain preliminary activities, which the *Mt. Clemens* case had

2. 328 U.S. 680; 66 S.Ct. 1187 (1946).

held to be compensable" (R. 179). To accept the contention of the Secretary of Labor that all activities which are "indispensable to the performance of productive work" are principal activities which must be compensated in accordance with the Labor Standards Act would, he concluded, "deny effect to the intended meaning of the Portal-to-Portal Act" since "all of the activities designated as 'preliminary' by the Supreme Court in the *Mt. Clemens* case can be considered indispensable" (*Id.*). For these reasons, and on the basis of the findings of the Trial Court that the knife sharpening performed by respondent's employees is in fact preliminary and postliminary to their principal activities, that it is not compensable by contract or custom, and that it is essentially different from their customarily compensable work, the Court held that off-shift knife sharpening performed by respondent's employees falls within the exclusion to the provisions of the Labor Standards Act created by Section 4 of the Portal Act.

SUMMARY OF ARGUMENT

1. Section 4 of the Portal Act expressly excludes from the minimum wage and overtime requirements of the Labor Standards Act "any" activities "preliminary to or postliminary to" the principal activities "which such employee is employed to perform." The statute should be construed accordingly to exclude the pre-shift knife sharpening in this case. The Portal Act makes no distinction between indispensable and dispensable (i.e. between necessary and unnecessary) preliminary activities.

2. It is a question of fact whether any particular activity is preliminary (or postliminary) or principal. The Courts below found on adequate evidence that the knife sharpening was preliminary. They also found that the employee's principal activities were to work in the killing room and cutting

floor, killing and butchering, and not to work at sharpening knives in the knife sharpening room. Finally, the facts found show that the knife sharpening was not required to be performed at the plant and is indispensable only in the sense that rising, eating and travelling to the plant are indispensable.

3. Interpretation of the statute according to its common sense meaning is also compelled by its purpose as shown by Section 1 of the Act and by its legislative history. These show that Congress intended to prevent future unexpected claims as well as to deal with the "existing emergency." Congress was not repudiating this purpose *sub silentio* in treating accrued claims separately from future claims. We agree that Section 2 of the Portal Act (relating to accrued claims) is broader than Section 4 (relating to future claims): It does not follow as contended by petitioner, that Section 4 excludes only preliminary activities that are dispensable and unnecessary, i.e. not indispensable. Section 2 excluded liability for *all* non-principal activities even though they occurred during the shift. Section 4 excludes only non-principal activities occurring before or after the shift; but Section 4 excludes *all* such non-principal, preliminary or postliminary activities, whether or not indispensable.

4. The Congressional history affirmatively shows that Section 4 outlaws indispensable (as well as dispensable) preliminary and postliminary activities. There is an abundance of authority in the Congressional debates so showing. The few quotations taken out of context by petitioner show only that Senator Cooper loosely used the term "indispensable" to mean "integral."

5. The 1949 amendments to the Labor Standards Act do not imply that the statute means anything other than what it says. Section 3(o) was enacted to establish that the activi-

ties dealt with in collective bargaining contracts were not thereby withdrawn from the exclusion of Section 4. Section 16(c) preserves existing administrative interpretations *not inconsistent* with the statute. Petitioner's present interpretation is both inconsistent with the statute and inconsistent with other interpretations of the Wage and Hour Administrator.

ARGUMENT

I. The knife sharpening here is included within the meaning of "any" activity preliminary to the employee's principal activities and so is non-compensable.

A. THE STATUTE EXCLUDES ALL PRELIMINARY ACTIVITIES.

The statute is not obscure. It expressly excludes from the minimum wage and overtime pay requirements "any" activities which are "preliminary to or postliminary to" the principal activity or activities which the employee is employed to perform. The statute specifies that the excluded preliminary and postliminary activities are those "which occur either prior to the time of any particular work day at which such employee commences, or subsequent to any particular time at which he ceases such principal activity or activities." The statute says nothing about "indispensability": it is not limited to preliminary activities that are "dispensable" or unnecessary to the principal activity. Clearly, the activities excluded by the language of Section 4, in the absence of a contrary contract or custom, are *all* those activities which occur before or after the activities which the employee is hired to perform.

When, as here, Congress uses words which are in common use without providing a special definition, it is well settled that these words "are presumed to be used in their ordinary and usual sense, and with the meaning commonly attribut-

able to them." *De Ganay v. Lederer*, 250 U.S. 376, 381, 39 S.Ct. 524, 525 (1919).

> "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618, 64 S.Ct. 1215, 1221 (1944).)

This Court in the *Mt. Clemens Pottery Co.* case specifically characterized "sharpening tools" as "preliminary", 328 U.S. 680, 693, 66 S. Ct. 1187, 1195 (1946). The Court in *Markert v. Swift & Co.*, 173 F.2d 517, 520 (2d Cir. 1949) described the repairing or preparing tools of packing house employees for use as preliminary and postliminary activities. The Court in *Smith v. Cudahy Packing Co.*, 76 F. Supp. 575, 577 (D. Minn. 1947) described as "preliminary to the employees' principal activity" "sharpening knives and doing similar things necessary to the carrying out of [the employees'] work."

This usage accords with the meaning given in Webster's New International Dictionary which defines "preliminary" as "preceding the main business," "prefatory," "preparatory."

Judge Healey found the knife sharpening in this case to be a preliminary or postliminary activity, (Fdg. XIV, R. 19) and Judges Orr, Pope and Yankwich sitting as the Court of Appeals for the Ninth Circuit agreed. Surely the Trial Court in this case was entitled to attribute a meaning to "preliminary and postliminary" which accords with that given in a standard dictionary and the usage of 16 members of the federal judiciary.

Similarly, Congress did not, in enacting the Portal Act, define the phrase "principal activity or activities which

employees are employed to perform." However, as was pointed out in *McComb v. C. A. Swanson & Sons*, 77 F. Supp. 716, 731 (D. Neb. 1948):

> "Those words are not abstruse, obscure or uncertain. They refer to the productive work in behalf of the employer which he hires the worker to do. For the machinist, it is the work at his bench or lathe; for the store clerk, the sale of goods; for the carpenter the labor in the erection or repair of a building. And for a poultry eviscerator, it is the task to which he or she is assigned in the eviscerating room, be it the hanging of birds, decapitation, disemboweling, cleaning the room or any one or more the multitude of operations in the room's service. . . ."

In this case, the work which "the employer hires the worker to do" as the Trial Judge found, is the "killing, cleaning and cutting up of carcasses of cattle and hogs" (Fdg. XIII, R. 18), and not any preparatory activities they may be required to do. Neither Record nor Findings support the government's constant assertion of indispensability. True, the knife must be sharp. But it is not at all indispensable that it be sharpened at the plant or under the control of the Company. Moreover, the record affirmatively shows that the sharpening is done at the plant only in part and as a convenience, not as a requirement (Fdgs. VII, VIII, R. 17). Thus, the knife sharpening was indispensable solely in the sense that rising, eating and travelling to work were indispensable.

B. THE TRIAL COURT'S FINDINGS, SUPPORTED BY EVIDENCE AND AFFIRMED BY A UNANIMOUS COURT OF APPEALS, ARE CONCLUSIVE.

Every federal court which has had occasion to determine whether particular preliminary or postliminary activities are within the exclusion created by Section 4(a)(2) of the Portal Act has agreed that the question of what are the "principal activities" which employees are employed to perform is, of necessity, one of fact to be resolved by the Trial Judge on the basis of the circumstances in each individual case. As the Eighth Circuit pointed out in *Ciemnoczolowski v. Q. O. Ordnance Corp.*, 12 WH Cases 469, 55 A.L.C. 612, 614-615 (April 29, 1955):

> "The fact that the area embraced within the term 'principal activity' was not precisely defined by Congress necessarily resulted in a relegation of the question to the courts under facts peculiar to each case, applying the general principles laid down by Congress. . . . Whether a preliminary or postliminary activity, necessary to the performance of the 'principal activity' is an integral part of the principal activity is a question of fact to be determined from all the relevant evidence."

Similarly, in *Mitchell v. Southeastern Carbon Paper Co.*, 12 WH Cases 559, 55 A.L.C. 891, 894 (June 28, 1955) the Fifth Circuit concluded:

> "Just as the Supreme Court stated in the Portal-to-Portal cases that a determination of whether clothes changing and walking time, and like activities, were, prior to the enactment of the Portal-to-Portal Act . . . within the work week and thus compensable, was a question of fact, so here the determination as to whether the same activities are within the term 'principal activities' is one of fact."

In *Steiner v. Mitchell*, now before this Court the Sixth Circuit also recognized that the question of whether activi-

ties are "principal" activities which employees are employed to perform is necessarily dependent on the facts of each individual case. Thus the Court stated (215 F.2d 171 at p. 172):

> "The use of the phrase 'principal activity or activities' in the Statute suggests that the word 'principal' in some situations, may apply to more than a single type of activity, but, in view of the great variety of industrial conditions and various types of industries throughout the nation, it was obviously not practicable for the area embraced by the words 'principal activity or activities' to be precisely defined or marked out. The scope or reach of the phrase was left to be measured by the facts and circumstances involved in each industry."

In the *General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*, 29 C.F.R. 790, 790.7(b), 12 F.R. 7655, 7658, the Administrator stated:

> "No categorical list of 'preliminary' and 'postliminary' activities except those named in the act can be made, since activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities."

Reiterating at another point in this same bulletin that "an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions", the Administrator gave as an illustration the following example:

> "Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour

at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged." 29 C.F.R. 790.7(h), 12 F.R. 7659.

These statements are in strange contrast to the present position of petitioner. Petitioner now contends that the findings of the Trial Judge as to the principal activities must be overturned, though admittedly supported by competent evidence. Yet the circumstances of the instant case bear a striking resemblance to the example set forth above of the employee who is "waiting to be engaged". Respondent's knifemen own their own knives and they may sharpen them in any place, at any time, and in any manner they choose. Respondent does not require the knifemen to be physically present on its premises while they sharpen their knives and does not specify the length of time which the knifemen may spend in that operation. (See p. 3 *supra*). When the knifemen are using respondent's equipment and premises to sharpen their knives, they are, in the language of the Administrator's example, "preparing to be engaged"; they are not "engaged to prepare" for their principal activities on the production line.

All authorities thus point to the conclusion that the task of delineating the "principal activities" which particular employees are employed to perform is essentially a question of fact dependent on the circumstances of each individual case. The Trial Judge in this case has found that respondent's knifemen are employed to perform productive work

on the killing floor and in the cutting room of respondent's plant (*supra*, pp. 3-4). Time spent in sharpening their knives is preparatory to and not one of the principal activities which respondent employs them to perform (*supra*, p. 4).

These findings of the Trial Judge are, as the Court of Appeals recognized, amply supported by the evidence and must therefore be accepted as final. Fed. Rules of Civil Procedure, 28 U.S.C.A. Rule 52.

II. The petitioner's argument that "'principal activities" includes "indispensable activities" is without foundation. Petitioner's construction would bring back the conditions sought to be remedied by the Portal Act.

The petitioner would have this Court believe that his conclusion is compelled by (1) the fact that the Portal Act treats past and future claims differently, (2) the legislative history of the Act, and (3) subsequent amendments to the Labor Standards Act. However, the petitioner's argument disregards the purpose behind the different treatment of past and future claims, would defeat the very purpose for which the Portal Act was enacted, and is supported only by a few out-of-context quotations from the history of the Portal Act in Congress.

A. PETITIONER'S CONTENTION THAT PAST AND FUTURE CLAIMS ARE TREATED DIFFERENTLY IN THE STATUTE, WITH WHICH WE AGREE, DOES NOT SUPPORT HIS CONCLUSION THAT ONLY UNNECESSARY ACTIVITIES ARE EXCLUDED.

The Secretary of Labor correctly stated that Section 2 of the Portal Act relieves an employer from liability "on account of *any* activity" unless the compensability of such activity had been fixed by an express provision of contract or by an established custom. We agree that the exclusionary standard of Section 2 is broader than that of Section 4. The difference between Sections 2 and 4 was repeatedly explained in Congress:

> "The House bill bans all portal-to-portal claims, past and future, regardless of whether such claims are based on activities which occurred during the 'workday'—'whistle to whistle'. The Senate uses this approach only to past claims. As to future claims, however, activities occurring within the 'whistle to whistle' period are not affected by the Senate bill. Such activities are permitted to be treated as they have been, under the Fair Labor Standards Act. All activities, preliminary to or postliminary to the 'whistle-to-whistle' period are made noncompensable, unless by custom or contract." 93 Cong. Rec. 2084.

Senator Donnell, one of the members of the Subcommittee of the Senate Committee on the Judiciary which drafted the Portal Act[3], had the same understanding:

> "Now when we come to the future there is quite a different picture. Here we realize that it is important that the employees and the employers may, so far as possible, be free from the possibility of injustice throughout the regular workingday period, the time from the

3. Senators Donnell, Cooper and Eastland were the members of the Subcommittee of the Committee on the Judiciary which conducted hearings on the measure (93 Cong. Rec. 2124) and formulated the Senate version (93 Cong. Rec. 2131, 93 Cong. Rec. 2293).

whistle in the morning to the time of the whistle in the afternoon. Therefore we are not undertaking to legislate in Part III as to the workday proper; but we are legislating solely with respect to the preliminary activities, before the beginning of the workday, and the postliminary activities, after the conclusion of the workday, the two classes of claims with respect to which this past uncertainty has arisen in our economy. . . ." 93 Cong. Rec. 2181.

"It is also true that Part III which relates to future claims, does not legislate with respect to the period of the workday proper, as understood in common parlance." 93 Cong. Rec. 2182.

The Courts have construed Section 2 to allow recovery for principal activities performed off-shift[4]. But this does not imply that Section 4 must exclude only those activities not "indispensable" to the performance of the employee's principal activities. The essential difference between Sections 2 and 4 is that Section 2 excludes incidental activities performed on or off shift if there is no custom or contract making such activity compensable[5].

Similarly, the treatment of pre-1947 and post-1947 claims differently in other sections of the statute does not illuminate this problem. Section 3 (see Pet. br., pp. 33-34) which provided that past claims could be compromised or waived, was inserted to provide some relief as to past claims should

4. *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir., 1952); *Central Missouri Tel. Co. v. Conwell*, 170 F.2d 641 (8th Cir., 1948); *United States Steel Co. v. Burkett*, 192 F.2d 489 (4th Cir., 1951); *F. W. Stock & Sons v. Thompson*, 194 F.2d 493 (6th Cir., 1952).

5. *Smith v. Cleveland Pneumatic Tool Co.*, 173 F.2d 775 (6th Cir., 1949).

the courts declare Section 2 unconstitutional.[6] Section 9 (see Pet. br., pp. 37-38) allows employers to claim as a good faith defense the rulings, regulations, orders, approval or interpretation of any agency of the United States only for pre-1947 claims. During the period immediately preceding the enactment of the Portal Act the Public Contracts Administrator, the Maritime Commissioner, the War Shipping Administration, the Salary Stabilization Unit of the Treasury Department, the War Labor Board and the Interstate Commerce Commission had all issued interpretations which affected wage and hour questions.

It is clear that there is nothing in the statute to indicate that Section 4 means any more or any less than it says. The other pertinent sections of the Portal Act rather confirm that the common sense interpretation of Section 4 was the one Congress intended. Contrary to the implication of petitioner's brief, the Congressional purpose in enacting the Portal Act was not limited to the "existing emergency" which had arisen as the result of the great number of claims which had been filed prior to its enactment (Pet. br., p. 10). Just as Section 2 of the Portal Act was designed to meet the "existing emergency", so Section 4 was designed to prevent such an emergency from arising in the future.

In Section 1 of the Portal Act Congress found that if the Labor Standards Act continued to be interpreted in accordance with the judicial standards which it desired to disaffirm "*there would be created both an extended and continuous uncertainty* on the part of industry, both employer and employee, as to the financial condition of productive establishments . . ." employees would receive windfall payments, including liquidated damages, of sums for activities per-

6. 93 Cong. Rec. 2131 (Senator Donnell).

formed by them without any expectation of reward beyond that included in their agreed rates of pay"; and "*there would occur the promotion of increasing demands* for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in" (Section 1(a), emphasis added).

To say that Section 4 was designed to make noncompensable only those preliminary and postliminary activities which are unnecessary to the performance of the employees' principal activities is to nullify the purpose for which the statute was enacted, as expressly stated in the Congressional Findings of Fact and Declarations of Policy (Section 1). Moreover, the legislative history of the Act, upon which the Secretary principally relies, even if it were proper to use Congressional debates and reports to nullify the words of the statute as enacted,[7] does not support the petitioner's contention.

---

7. "But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed." (*United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136 (1929)). See, also, *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 492, 67 S.Ct. 789, 793 (1947).

B. THE HISTORY OF THE PORTAL ACT IN CONGRESS SHOWS THAT CONGRESS INTENDED SECTION 4 TO PRECLUDE CLAIMS LIKE THOSE INVOLVED IN THE MT. CLEMENS POTTERY CO. CASE AND HERE.

The Senate Report accompanying the Portal Act confirms that Congress was attempting to overrule the *Mt. Clemens* decision, not extend it. This report gives as examples of non-compensable activity "[c]hecking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities occurring prior and subsequent to the workday,[8] *such as the preliminary activities which were involved in the Mt. Clemens case*" (S. Rep. No. 48, 80th Cong., 1st Sess. p. 47). Following this, the Report states that "'principal activity or activities' includes all activities which are an integral part thereof, *as illustrated by*" the examples of the lathe operator who must perform maintenance work on his machine and the garment worker who must come before the other employees to lay out work and ready machines for operation. These examples, the Secretary feels, "perfectly describe the case at bar" (Pet. br., p. 22). In the case of "tool sharpening" he would disregard the many differences between the knifemen in this case, and the lathe operator in the Senate Report. He attaches no significance to the facts that the knives, in contrast to the lathe, belong to the employees (Fdg. VI, R. 16); that they can use them for whatever private purposes they choose (Fdg. VI, R. 16), which naturally affects the amount of sharpening they need; that they can sharpen their knives at any place, at any time outside regular working hours, and in any man-

8. "For purposes of clarity, this report uses the term 'workday' to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee is employed to perform." S. Rept. No. 48, 80th Cong., 1st Sess. pp. 46-47.

ner or method they choose (Fdgs. VII, VIII, R. 17); that respondent does not specify the degree of sharpness, the type of edge or the manner or method to be used in sharpening the knives. (Fdg. VIII, R. 17). The petitioner would entirely disregard these manifest differences between the lathe operator and the knifeman in applying this example in the Senate Report. It is entirely correct that if all knife sharpening in any industry comes within the example contained in the Senate Report above, the word "integral" must be expanded to mean "indispensable." But if the example is confined to workmen who as a part of their principal activities, must put in time as maintenance men, the Senate Report does not imply the broad definition of principal activities contended for by petitioner.

Such a test would also be inconsistent with the declared purpose of the Portal Act as set forth in the Senate Report —"The public interest requires a correction of the condition now presented by the portal-to-portal claims, including those in pending suits and safeguards against futur[illegible] repetition of such a condition" (S. Rep. No. 48, 80th Cong., 1st Sess., p. 1). The test in the *Mt. Clemens* case, which Congress was attempting to repudiate, was much narrower than inclusion of everything "indispensable" to the performance of a principal activity. Justice Murphy in *Mt. Clemens* at least confined the period of work to the time "an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place" and "exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit" (328 U.S. at 691, 693, 66 S. Ct. at 1194, 1195). Any activity which is necessary for the worker to perform his job, may be considered indispensable to the performance of a principal

activity but is not *ipso facto* an "integral part of the principal activity."

Of course, we are not arguing that Congress intended to make the activities which were involved in the *Mt. Clemens* case non-compensable under all circumstances (See Pet. br., p. 23). But Congress did make non-compensable, activities like those found compensable in the *Mt. Clemens* case, when performed under like circumstances.

The knife sharpening in this case fits both the words, and the context of the *Mt. Clemens* decision. There is a well-established custom making knife sharpening non-compensable (Compare 328 U.S. at 685). It consumes but a short time (Compare 328 U.S. at 683, 696, 697). It is not productive work (Compare 328 U.S. at 689). It is not even as "necessary" as those activities in the *Mt. Clemens* case, because it need not be done on the employer's premises (Compare 328 U.S. at 691, 692, 693).

The Congressional debates support only this Court's wisdom in refusing to look at isolated remarks in Congress to find out what a statute means. In response to Senator Cooper's comment which petitioner relies upon so heavily (Pet. br. p. 18), Senator Barkley stated:

> ". . . I get the very strong impression, if I am mistaken I wish to be corrected, from reading the bill and the report, and listening to the discussion, that under the definition of portal to portal activities, unless there is a contract, written or unwritten, or a custom under which such activities are compensable, all preliminary and postliminary work required by an employer is non-compensable." 93 Cong. Rec. p. 2350.

Senators McCarran (*Id.* at 2245), McGrath (*Id.* at 2239), Thomas (*Id.* at 2268), Murray (*Id.* at 2237), Wiley (*Id.* at 4269), Ellender (*Id.* at 2297), O'Mahoney (*Id.* at 2299) and Representative Gwynne, one of the Conference Managers

for the House of Representatives (*Id.* at pp. 4388-9), placed the same interpretation on the Portal Act as Senator Barkley. In the face of this, the casual remarks of Senator Cooper, even though he was one of the three-man Subcommittee which drafted the bill[9] do not permit the conclusion that Congress meant "principal activity" to include anything "indispensable" to the performance of the principal activity and drastically restricting the scope of Section 4.

C. THE 1949 AMENDMENTS TO THE LABOR STANDARDS ACT ARE IRRELEVANT TO PETITIONER'S INTERPRETATION OF THE PORTAL ACT.

Section 3(o) of the Labor Standards Act was added in 1949, and excludes from the hours for which an employee is employed any time spent in changing clothes and washing at the beginning or end of each workday which was excluded by a collective bargaining contract.[10] The section was enacted to prevent a very ingenious argument from undercutting the effect of the Portal Act.

In *Galvin v. National Biscuit Co.*, 82 F. Supp. 535, a collective bargaining contract provided that 15 minutes of clothes changing time would be compensated for, but the employees actually took more than 15 minutes to change. It was argued that since a contract provided that this activity was compensable, this activity was exempted from the operation of the Portal Act and *all* the time spent in the activity should be compensated for. The argument did not succeed in this case.

---

9. Senator Donnell's remarks concerning the operation of the bill on future claims are quoted at pp. 14-15 *supra*. Senator Eastland also implied that future portal-to-portal claims would be eliminated. See colloquy between Senators McGrath and Eastland at 93 Cong. Rec. p. 2249.

10. Section 3(o) is reprinted in petitioner's brief, p. 40.

Section 3(o) was directed at this type of argument in reference to clothes changing and bathing, as the colloquy between Representatives Herter and Lucas (quoted in its entirety in the brief for Petitioner, pp. 27-29, *Steiner v. Mitchell*, No. 22) shows.

Sec. 16(c) of the Labor Standards Act, which provides that any order, regulation or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, pursuant to the Labor Standards Act "except to the extent that any such order, regulation, interpretation or agreement may be inconsistent with the provisions of this Act" remains in effect,[11] does not aid the petitioner's argument. The interpretation relied upon by Petitioner (Pet. br., 26-27) is inconsistent (*supra*, pp. 13-21). Moreover, the Petitioner has disregarded other statements that appear in the same long and confusing statement:

> "The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform': they do not include noncompensable 'walking, riding, or traveling' of the type referred to in Section 4 of the Act. Several guides to determine what constitute 'principal activities' were suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that 'the realities of industrial life,' rather than arbitrary standards, 'are intended to be applied in defining the term "principal activity or activities,"' and that these words should be interpreted with due regard to general established compensation practices in the particular industry or trade.'" 29 C.F.R. 790.8(a), 12 F.R. 7659-60.

Using these criteria, the activities of the knifemen are not compensable under the Act.

---

11. Reprinted in Pet. br., pp. 40-41.

Congress cannot be regarded as ratifying this drastic reinterpretation of the Portal Act merely because the General Counsel of the Associated Retail Bakers of America, William A. Quinlan, submitted a letter to the Subcommittee of the Committee on Labor and Public Welfare (See Pet. br., p. 25).

The situation in this case is very different from that which obtained in *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S. Ct. 565 (1953) and in *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 75 S. Ct. 719 (1955). In the *Alstate Construction Co.* case, the construction placed on the words production of goods "for commerce" by the administrators of the Labor Standards Act was consonant with judicial interpretations which had not been repudiated by Congress. And "[t]he new interpretation was reported to congressional committees on a number of occasions. Interested employers severely criticized the Administrator's changes. Specific amendments were urged to neutralize his interpretation." (345 U.S. at 16, 73 S. Ct. at 567). In light of these facts, naturally it is reasonable to assume that Congress was ratifying the administrative interpretation. In *Maneja v. Waialua Agricultural Company, (supra)* the Administrator's interpretation was also changed to conform to judicial interpretation of the Act, and had come to the notice of the subcommittees of both the House and Senate which were considering amendments to the Labor Standards Act. In the instant case, the interpretation was not placed before the sponsors of the Portal Act, the Committee on the Judiciary in the House and Senate but before a Subcommittee of the Committee on Education and Labor in the Senate (See Pet. br., p. 27).

CONCLUSION

In passing the Portal Act, Congress wanted to prevent "the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by the employer or the employee at the time they were engaged in" and found that "the Fair Labor Standards Act of 1938, as amended, has been interpeted judicially in disregard of long-established customs, practices, and contracts between employers and employees."[12] (Section 1). What Congress intended to eliminate were claims for preparatory activity which might be considered work because they benefit the employer, but which the employer does not require to be done in a certain way or at any particular time, and which by long custom and practice have not been compensated for.

It is easy to negate Congress' action in passing the Portal Act, and say that everything indispensable to the performance of the job is compensable. It is more difficult to formulate a workable definition of "principal activity" which will clearly delineate the common sense understanding of "work" which ought to be compensated for, from preparatory activity which the employer ought not to be compelled to clock and supervise. This is not an instance of the employer's not having to compensate for this activity. That knifemen must buy the majority of the knives they use, that they must be replaced frequently, that men must spend time procuring the knives, that they must spend time sharpening the knives, that they have spent time acquiring the skills required to sharpen knives and butcher meat must be taken into consideration in setting the basic wage rate. The Amalgamated

12. See the statements of Representative Walter, 93 Cong. Rec. 2189; Senator Donnell, *id.* at 2111, 2119, 2122, 2182; Senator Malone, *id.* at 2363; Senator Wherry, *id.* at 2194.

Meat Cutters and Butcher Workmen and King Packing Company might have agreed to include knife sharpening time in the collective bargaining agreement. But the union and King Packing Company deliberately struck a bargain which did not include knife sharpening as compensable activity. This contract must be taken as the workable arrangement whereby the needs of both employer and employee are deliberately considered and balanced.

If the petitioner were to succeed in this case, respondent would either have to hire someone to sharpen knives (R. 156), an activity which the knifemen prefer to do themselves (*supra*, p. 2), or supervise the activities in the knife sharpening room (R. 156), keep track of how much time the men actually spent sharpening their knives, and shorten the shift to accommodate knife sharpening time. The Portal Act was designed to guard against such an unforeseen disruption of the respondent's plant.

The respondent respectfully submits that the decision of the District Court, affirmed by the Court of Appeals, should be affirmed here.

Dated: November 3, 1955

Respectfully submitted,

WILLARD S. JOHNSTON
GEORGE H. JOHNSTON
256 Montgomery Street
San Francisco, California

Attorneys for Respondent
King Packing Company